

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,)
Plaintiff,) 03:03-CR-00176-LRH-VPC
v.) 03:06-CV-00733-LRH-VPC
GORDON TODD SKINNER,)
Defendant.)

) ORDER

Presently before the court is defendant Gordon Skinner's ("Skinner") Motion Pursuant to 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (# 38¹). The United States of America has filed a Response (# 83), and Skinner replied (## 106). Skinner has also filed motions for appointment of counsel (# 82), discovery (# 85), and an evidentiary hearing (# 89). The United States of America has filed a Response (# 83). Finally, Skinner has filed numerous miscellaneous motions (## 86, 87, 88, 89, 90, 91, 92, 93, 95, 96, 97, 99, 100, 101, 102, 104, 107, 111, 113, 115), to which the United States has responded (## 98, 108).

I. Factual and Procedural Background

On September 3, 2003, Skinner was indicted by the grand jury for possession with intent to distribute ecstasy in violation of 21 U.S.C. § 841(a)(1). Skinner pled guilty to the offense on

¹Refers to the court's docket number.

1 March 22, 2004. On June 21, 2004, this court sentenced Skinner to fifty months imprisonment - a
2 sentence on the low end of the guideline recommendations. Judgment was entered on June 22,
3 2004. Skinner did not appeal his conviction.

4 Skinner filed the present § 2255 motion on December 4, 2006. Skinner's motion sets forth
5 the following grounds for relief: 1) his conviction was tainted due to the prosecution's failure to
6 disclose favorable evidence; 2) the grand jury was corrupted by being shown tainted evidence and
7 was corrupted by the motives of the Department of Justice ("DOJ"); 3) his conviction was obtained
8 by a violation of his privilege against self incrimination, immunity violations, the motives of the
9 DOJ and immunized information shown to the court; and 4) he was subjected to malicious
10 prosecution due to a complaint he filed against an Assistant United States Attorney.

11 Skinner subsequently filed several letters (## 40, 41, 42, 44) with the court indicating he
12 wished to add claims for 5) ineffective assistance of counsel; 6) due process violations arising out
13 of his grant of immunity; and 7) vindictive prosecution.

14 The court denied Skinner's § 2255 motion on April 12, 2007. The court found Skinner's
15 claims were untimely filed and barred by the one-year statute of limitations contained in 28 U.S.C.
16 § 2255. The court further noted that Skinner waived his right to appeal and that this waiver barred
17 most of Skinner's claims.

18 The Ninth Circuit vacated the judgment and remanded the case to this court on January 30,
19 2008, in order to offer Skinner an opportunity to present his position on the court's finding that the
20 § 2255 motion was untimely. The Ninth Circuit further stated that the parties could address
21 whether this court properly ruled sua sponte that the waiver in the plea agreement barred Skinner's
22 claims for relief. Since remand, Skinner's § 2255 motion has been fully briefed by the parties.

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1 **II. Discussion**

2 **A. Motion for Appointment of Counsel**

3 Skinner has filed a motion for appointment of counsel. Skinner is currently an inmate at the
4 Dick Conner Correctional Center in Hominy, Oklahoma. Skinner contends that the prison
5 conditions and his lack of legal training warrant the appointment of counsel. The United States
6 opposes Skinner's motion arguing that Skinner is unlikely to succeed on the merits and that Skinner
7 is able to present his contentions clearly, forcefully, and coherently

8 This court may appoint counsel for an impoverished habeas petitioner if it determines that
9 the interests of justice so require. 18 U.S.C. § 3006A(a)(2)(B). "In deciding whether to appoint
10 counsel in a habeas proceeding, the district court must evaluate the likelihood of success on the
11 merits as well as the ability of the petitioner to articulate his claims *pro se* in light of the complexity
12 of the legal issues involved." *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983) (citations
13 omitted).

14 In this case, the court finds that the appointment of counsel is not warranted. Skinner's §
15 2255 motion has been fully briefed and submitted to this court. Skinner has demonstrated his
16 ability to clearly articulate his claims. Furthermore, the court analyzed Skinner's motion in Section
17 II(B) of this order and finds that it is time barred. Thus, Skinner's motion for appointment of
18 counsel will be denied.

19 **B. 42 U.S.C. § 2255**

20 As previously mentioned, Skinner's § 2255 motion raises several alleged violations.
21 However, the court must determine whether the petition is timely before it can address the merits of
22 Skinner's motion. The United States contends that the motion is untimely because Skinner did not
23 file the motion before the one-year statute of limitations expired on July 7, 2005. Furthermore, the
24 United States argues that, even if the statute of limitations did not begin running until March 26,
25 2005, when Skinner alleges that he discovered new facts, the statute of limitations expired before

1 Skinner filed the current motion. Skinner contends that this motion is timely because this is his
2 first opportunity to properly address the situation. Skinner also alleges that various impediments
3 have prevented him from filing the motion within the one-year statute of limitations contained in 28
4 U.S.C. § 2255(f).

5 28 U.S.C. § 2255(a) provides,

6 a prisoner in custody under sentence of a court established by Act of Congress claiming
7 the right to be released upon the ground that the sentence was imposed in violation of
8 the Constitution or laws of the United States, or that the court was without jurisdiction
9 to impose such sentence, or that the sentence was in excess of the maximum authorized
10 by law, or is otherwise subject to collateral attack may move the court which imposed
11 the sentence to vacate, set aside or correct the sentence.

12 However, a defendant's motion is untimely if he does not file within one year from the latest of
13 four dates specified by the statute. 28 U.S.C. § 2255(f).

14 Two of these dates are relevant in the current case. First, the limitation period may begin on
15 "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1). Second,
16 the statute of limitations may begin from "the date on which the facts supporting the claim or
17 claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. §
18 2255(f)(4). Skinner does not dispute that, under either scenario, the statute of limitations has
19 expired. Under the first approach, judgment became final ten days after the court entered judgment
20 on June 22, 2004. *See R. App. P. 4(b)(1)(A)*. Accordingly, the limitations period would have
21 ended on July 7, 2005. *See id.* Skinner clearly missed this deadline because he filed the current §
22 2255 motion on November 20, 2006, more than sixteen months following the end of the statutory
23 period.

24 Under the second approach, even if Skinner can demonstrate that he discovered new facts
25 after final judgment, Skinner's motion is still untimely. Skinner argues that he discovered new
26 facts after sentencing which implicate improper use of past immunized testimony. Specifically,
Skinner contends that he learned new facts from "DEA-6" forms and e-mails on March 26, 2005,
which demonstrate that there may have been a problem with his sentencing and his guilty plea.

1 Skinner also argues that he learned more information regarding immunized testimony through
 2 Kastigar hearings on May 25, 2005, August 8, 2005, August 9, 2005, and June of 2006. However,
 3 Skinner admits that he began asking about his Kastigar rights shortly after pleading guilty. Skinner
 4 admits to learning of facts relevant to his claim in March, May, and August of 2005. The fact that
 5 Skinner may have learned of new facts in June, 2006, to support a known claim that he could have
 6 previously discovered had he freely raised his claim does not restart the running of the limitations
 7 period. *See U.S. v. Segers*, 271 F.3d 181 (4th Cir. 2001). Thus, Skinner could have discovered the
 8 “new” fact earlier through the exercise of due diligence. *See 28 U.S.C. § 2255(f)(4)*.

9 Consequently, Skinner’s § 2255 motion is time barred unless the limitation period is tolled
 10 pursuant to the equitable tolling doctrine. According to a two pronged approach, equitable tolling
 11 applies to a defendant when 1) “he has been pursuing his rights diligently” and 2) “some
 12 extraordinary circumstances stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).
 13 The court may apply equitable tolling “when external forces, rather than a petitioner’s lack of
 14 diligence, account for the failure to file a timely claim.” *Miles v. Prunty*, 187 F.3d 1104, 1007 (9th
 15 Cir. 1999). Furthermore, extraordinary circumstances must “make it impossible to file a petition on
 16 time.” *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002). For the defendant, “the threshold
 17 necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule.” *U.S. v.*
 18 *Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000). Moreover, equitable tolling is used sparingly as it
 19 is “unavailable in most cases.” *See Miles*, 187 F.3d at 1107.

20 As mentioned, equitable tolling requires a showing of an extraordinary circumstance that
 21 made it impossible to file a claim on time. For example, in *Lott v. Mueller*, the court held that
 22 equitable tolling may apply when a prisoner was denied access to legal files pertinent to his habeas
 23 petition for eighty-two days while on temporary transfers, and his petition was only seven or twenty
 24 days late. 304 F.3d 918, 924, 925-26 (9th Cir. 2002). Equitable tolling has also applied when the
 25 acts of prison personnel prevented the defendant from filing his motion on time. *Miles*, 187 F.3d at
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1 1107. A third example of extraordinary circumstances justifying equitable tolling occurred when
 2 mental incompetency prevented a prisoner from assisting his attorney in filing a timely habeas
 3 petition. *Calderon v. U.S. Dist. Court for Cent. Dist. of California (Kelly)*, 163 F.3d 530, 541 (9th
 4 Cir. 1998) (en banc).

5 On the other end of the spectrum, equitable tolling is not justified when a defendant cannot
 6 demonstrate extraordinary circumstances or that he diligently pursued the claim. In *Miranda*, an
 7 attorney's negligence in calculating the statute of limitations for a habeas petition did not constitute
 8 extraordinary circumstances. 292 F.3d at 1066-67. In *Yang v. Archuleta*, the court held that a
 9 prisoner, whose second language was English, did not demonstrate extraordinary circumstances
 10 when he did not file his habeas petition by the statutory deadline because he did not understand the
 11 legal process. 525 F.3d 925, 930 (10th Cir. 2008). Furthermore, the defendant did not show that
 12 he diligently pursued the claim when, instead of presenting any actions he took in furtherance of his
 13 rights, he merely stated that his court-appointed attorney did not inform him of any time
 14 requirements for further filing. *Id.* at 4.

15 After carefully considering the law, facts, and both parties' arguments, the court finds
 16 equitable tolling is not appropriate in this case. Thus, Skinner's claims are barred by the one-year
 17 statute of limitations contained in 28 U.S.C. § 2255(f).

18 The court arrives at this conclusion for several reasons. First, Skinner's petition is either
 19 three months or sixteen months late depending on the date used to calculate the limitations period.
 20 Next, although Skinner contends that he was denied access to a legal library, mail, phone services,
 21 and writing materials at various times during incarceration, he provides no evidence to demonstrate
 22 he was actually denied these materials. Unlike the defendant in *Lott*, 304 F.3d at 921, who
 23 provided the court with a prison log and affidavit to show that he could not file his habeas petition
 24 on time, Skinner merely averred in his pleadings that he intermittently had no access to resources
 25 necessary to file his petition. Moreover, Skinner did not provide an adequate time line to show
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1 when he had no access to these materials. Skinner did not state any dates when he allegedly had no
2 access to resources or materials while he resided at the Oklahoma City Federal Transfer Center, the
3 Tulsa County Jail, or Creek County Jail. Moreover, Skinner admits he had access to materials at
4 various times. Thus, Skinner has not demonstrated that the alleged temporary denial of access of
5 materials made it impossible to file his claim on time.

6 Skinner also cannot claim that his ignorance of the law is an extraordinary circumstance.
7 Like the defendant in *Yang* who unsuccessfully argued that his ignorance of the law precluded him
8 from filing his habeas petition in a timely manner, Skinner's contention that he did not know about
9 a § 2255 motion or the statute of limitations does not constitute extraordinary circumstances. *See*
10 *Yang*, 525 F.3d at 930.

11 Furthermore, Skinner does not show that he diligently pursued his rights because he did not
12 establish any specific actions taken in pursuit of his petition. Skinner admitted that he had access
13 to a library for seven days after he was transferred to El Reno. While Skinner stated that "he was
14 finally making progress and that he had found much case law supporting his claims," he showed no
15 specific actions taken in pursuit of his rights. Skinner also did not account for what he had done
16 when he had access to a "very small" legal library while he was incarcerated at El Reno. Finally,
17 Skinner did not show the court any specific actions taken before his writing and research materials
18 were allegedly seized at the Tulsa County Jail.

19 Indeed, it appears that Skinner had several opportunities to pursue his § 2255 petition
20 during incarceration before the statute of limitations expired. However, Skinner did not take
21 advantage of these opportunities. Consequently, Skinner's § 2255 petition is untimely because he
22 failed to file his habeas petition within the one-year statute of limitations and did not demonstrate
23 any circumstances to justify equitable tolling.

24 **C. Motion for Discovery**

25 Next, Skinner has filed motions for discovery (## 85, 97). Skinnners requests an order

1 requiring the Drug Enforcement Administration to produce an internal memorandum. Skinner
2 argues that the memorandum contains evidence of obstruction of justice and a continuing
3 conspiracy against him. Skinner also seeks the production of documents related to the
4 circumstances under which his attorneys have left his case due to a conflict of interest. The United
5 States opposes the motion arguing Skinner is not entitled to relief because his motion is untimely,
6 he has procedurally defaulted on the claims he attempts to raise and his claims are without merit.

7 Habeas petitioners do not have a general right to discovery. *Rich v. Calderon*, 187 F.3d
8 1064 (9th Cir. 1999). Rather, the court has discretion to authorize a § 2255 petitioner to conduct
9 discovery if the petitioner demonstrates good cause. Rules Governing Section 2255 Proceedings,
10 Rule 6(a). Here, the court finds that Skinner has failed to demonstrate good cause. As previously
11 discussed, Skinner's § 2255 petition is untimely. Thus, the court has no occasion to reach the
12 merits of Skinner's contentions.

13 **D. Motion to Send Plea Agreement**

14 Skinner has filed a motion (# 86) seeking a copy of his plea agreement. In light of this
15 court's decision to deny Skinner's § 2255 motion, Skinner's motion seeking a copy of his plea
16 agreement will be denied as moot.

17 **E. Motion for Identification of Female AUSA**

18 Skinner has filed a motion (# 87) seeking the identification of a female Assistant United
19 States Attorney ("AUSA") who declined to prosecute Skinner the day he was arrested. Skinner
20 asserts that the AUSA is a witness to his *Kastigar* claim. The United States opposes the motion
21 arguing that an initial decision by the United States Attorney's Office not to prosecute a case does
22 not bar the government from later deciding to prosecute this case.

23 As previously discussed, Skinner's § 2255 motion is time barred. Skinner has not provided
24 good cause to support his discovery request. *See* Rules Governing Section 2255 Proceedings, Rule
25 6(a). The court cannot address the merits of any of Skinners § 2255 claims. Thus, Skinner's

1 motion will be denied.

2 **F. Motion to Seal Documents**

3 Skinner next moves this court to seal (# 88) DEA-6 forms that he attached to his reply
4 points and authorities. Skinner contends that these forms are “DEA sensitive material,” and he
5 does not wish to allow unnecessary access to them because they are evidence of a criminal
6 conspiracy against him. The United States opposes the motion arguing Skinner has failed to show
7 the documents are sensitive so as to overcome the presumption in favor of access to records. The
8 court agrees with the Government and finds no basis to seal these documents. Similarly, Skinner
9 has provided no basis to seal additional documents in his motion to supplement (# 92).

10 **G. Motion for Hearing**

11 Skinner has filed a motion for a *Kastigar* hearing (# 89). The United States argues that a
12 *Kastigar* hearing is unwarranted because Skinner’s claims are incredible and legally frivolous. As
13 the court has determined the dismissal of Skinner § 2255 motion is appropriate, the court cannot
14 reach the merits of Skinner’s *Kastigar* claim. Thus, Skinner’s motion for a *Kastigar* hearing will
15 be denied.

16 **H. Motion for Production of Case Law**

17 Skinner has filed a motion (# 91) seeking a copy of the case law contained in the
18 Government’s opposition to his § 2255 motion. Skinner states that he does not have access to
19 Ninth Circuit case law as an inmate in the Oklahoma Department of Corrections. Skinner’s request
20 will be denied. Skinner has failed to provide competent evidence demonstrating he does not have
21 access to the federal reporter or some other means of obtaining case law.

22 **I. Motion for Leave to Exceed Page Limit**

23 Skinner has filed three motions to exceed the page limit for his reply points and authorities
24 (# 93, 107, 111). The court admonishes Skinner not to duplicate his filings. Although the court
25 agrees with the Government that a lengthy filing is unnecessary, the court will grant Skinner’s

1 motion in light of his pro se status. The court has fully considered Skinner's reply points and
2 authorities.

3 **J. Motion for Casemade**

4 The next motion before the court is Skinner's request for casemade (# 95). In his motion,
5 Skinner asks the court to provide him with all the filings in this case. In light of the court's
6 decision that Skinner's § 2255 motion is time barred, the court will deny the motion.

7 **K. Motion for Transcripts**

8 Skinner has filed a motion (# 96) requesting certain transcripts. The court will deny the
9 motion as Skinner's § 2255 action is time barred.

10 **L. Motions for Production of All Documents**

11 Skinner next seeks the production of various correspondences. As discussed more fully in
12 Section II(C), Skinner has failed to show good cause. As a result, Skinner's request will be denied.

13 **M. Motion to Supplement the Record**

14 Skinner has filed a motion to supplement the record (# 102) with *Kastigar* motions that
15 were filed in a different case. In light of the court's ruling that Skinner's § 2255 motion is time
16 barred, the court will deny Skinner's motion.

17 **N. Motion to Supplement Reply with Exhibits**

18 Skinner's next motion (# 113) seeks to supplement his reply points and authorities with
19 various exhibits. One of the exhibits Skinner wishes to attach allegedly relates to Skinner's claim
20 that his communications were impeded because he was unable to use a telephone or purchase
21 stamps. As a result, the court will grant Skinner's motion. The court has fully considered the
22 relevant evidence presented in ruling on Skinner's § 2255 motion.

23 **O. Motion for Copy of the Local Rules**

24 Finally, Skinner has made several requests and has filed a motion (# 115) for a copy of the
25 Local Rules of Practice. In light of the court's dismissal of Skinner's § 2255 motion, the court will

1 deny Skinner's request for a copy of the local rules.

2 IT IS THEREFORE ORDERED that Skinner's Motion Pursuant to 28 U.S.C. § 2255 to
3 Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (# 38) is hereby DENIED.

4 IT IS FURTHER ORDERED that Skinner's Motion for Appointment of Counsel (# 82) is
5 hereby DENIED.

6 IT IS FURTHER ORDERED that Skinner's motions for discovery (# 85, 97) is hereby
7 DENIED.

8 IT IS FURTHER ORDERED that Skinner motion (# 86) seeking a copy of his plea
9 agreement is hereby DENIED as moot.

10 IT IS FURTHER ORDERED that Skinner's Motion for Identification of Female AUSA (#
11 87) is hereby DENIED.

12 IT IS FURTHER ORDERED that Skinner's Motion to Seal Documents (# 88) is hereby
13 DENIED.

14 IT IS FURTHER ORDERED that Skinner's Motion for Kastigar Hearing (# 89) is hereby
15 DENIED.

16 IT IS FURTHER ORDERED that Skinner's Motions for Time (## 90, 104) are hereby
17 GRANTED. The court has fully considered Skinner's points and authorities.

18 IT IS FURTHER ORDERED that Skinner's Motion for Production of Case Law (# 91) is
19 hereby DENIED.

20 IT IS FURTHER ORDERED that Skinner's Motion to Supplement Motion to Seal
21 Documents (# 92) is hereby DENIED.

22 IT IS FURTHER ORDERED that Skinner's Motions to exceed the page limit (## 93, 107,
23 111) are hereby GRANTED.

24 IT IS FURTHER ORDERED that Skinner's Request for Casemade (# 95) is hereby
25 DENIED.

1 IT IS FURTHER ORDERED that Skinner's Motion for Transcripts (# 96) is hereby
2 DENIED.

3 IT IS FURTHER ORDERED that the Government's Motion for Time (# 99) is hereby
4 GRANTED. The court has fully considered the Government's points and authorities.

5 IT IS FURTHER ORDERED that Skinner's Motions for Production of All Correspondence
6 (## 100, 101) are hereby DENIED.

7 IT IS FURTHER ORDERED that Skinner's Motion to Supplement the Record (# 102) is
8 hereby DENIED.

9 IT IS FURTHER ORDERED that Skinner's Motion to Supplement Reply (# 113) is hereby
10 GRANTED.

11 IT IS FURTHER ORDERED that Skinner's Motion for a Copy of the Local Rules (# 115)
12 is hereby DENIED.

13 IT IS SO ORDERED.

14 DATED this 11th day of June, 2008.



17 LARRY R. HICKS
18 UNITED STATES DISTRICT JUDGE
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